In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-521

NATHAN S. SMITH
Petitioner,

vs.

ARTHUR R. GRIMM and JEANNINE GRIMM,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Respondents Arthur R. and Jeannine Grimm respectfully pray that the Petition for a Writ of Certiorari herein be denied.

INTRODUCTION

Petitioner seeks to bring within the jurisdiction of the federal courts a simple contract dispute over a contingent fee agreement between an attorney and his clients. In finding no federal jurisdiction, the

Ninth Circuit correctly sized up the tenor of the instant case as follows:

> At bottom, this is a simple contract dispute between Smith and Grimm. Smith wants to collect his contingent fee; Grimm defends upon the grounds of unconscionability and non-performance. These issues of state law predominate. The role of the Air Force in this case is merely that of the contract debtor. 534 F.2d 1346, 1349 (9th Cir. 1976).

An examination of the petition herein can result in only one conclusion—the requisite considerations governing review on certiorari dictated by Rule 19, Supreme Court Rules, have not been met.

PETITIONER'S ERRONEOUS GROUNDS OF JURISDICTION

The Ninth Circuit's decision is well reasoned and exhaustive, and works no injustice or hardship on attorneys seeking to collect their fees for services rendered to clients on federal matters. In the instant case, state court remedies are readily available, and, as the Ninth Circuit correctly pointed out, a state court can do anything a federal court could do in the instant case. In fact, petitioner has now filed his cause in state court and has secured precisely the same preliminary injunction he obtained in federal district court. *Smith v. Grimm,* Superior Court of the State of California, City and County of San Francisco, Action No. 712 033.

1. THERE IS NO FEDERAL QUESTION JURISDICTION UNDER 28 U.S.C. §1331(a)

Petitioner erroneously states that the Ninth Circuit "has subordinated the totally federal context in which this claim was asserted—i.e., a claim against federal funds held by federal officers to satisfy a judicially approved judgment against the United States" (Petition, page 13). There are no specific federal funds held by federal officers that petitioner can point to in the instant case. Even without considering the barrier posed by the Anti-Assignment Statute, 31 U.S.C. §203, petitioner's claim is rooted in state law and a state court can afford all the relief available in a federal court.

Houston v. Ormes, 252 U.S. 469 (1920) is totally inapplicable to the instant case. Aside from the fact that *Houston* was in reality a "state court" case falling into the federal ambit under the old judicial scheme for the District of Columbia (admitted by petitioner in his petition, page 14), jurisdiction could have only been asserted therein because a specific fund had been appropriated by Congress for payment to a specified person in satisfaction of a finding made by the Court of Claims. The key to the instant case is that petitioner can point to no such special fund appropriated for his client by Congress. Rather, Arthur Grimm was and will be paid out of the general appropriations for the Defense Department made on an annual basis (see e.g. Department of Defense Appropriations Action, Public Law 92-570, 86 Stat. 1184-1189).

2. THERE IS NO MANDAMUS JURISDICTION UNDER 28 U.S.C. §1361

For the same reasons adduced above, *Houston* affords no basis for mandamus jurisdiction. The Ninth Circuit was absolutely correct in its holding that the claim against the public officer involved was not clear and certain and the duty of the officer not ministerial.

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3. SOVEREIGN IMMUNITY

Sovereign immunity was not waived in the instant case, and does pose a real barrier to federal jurisdiction. As the district court noted in denying plaintiff's (petitioner's) motion to amend his complaint and in dismissing the action, the Ninth Circuit "apparently did not consider the government to have waived any claims of sovereign immunity. There has certainly been no such waiver with respect to the proposed amended complaint" (Petition, Appendix G, page xxxi).

Of most importance is the fact that the sovereign immunity barrier was an alternate ground for the Ninth Circuit's decision. Petitioner recognizes this fact on page 18 of his petition ("While sovereign immunity partakes of jurisdiction, it *may* not be the type of jurisdictional matter than can be raised sua sponte by a court. . . .") and yet asks this Court to grant certiorari on the basis of suc'. a remote and speculative question.

THE WRIT SHOULD NOT BE GRANTED

In quoting from *Gully v. First National in Meridian,* 299 U.S. 109, 118 (1936), the Ninth Circuit correctly recognized the lack of a federal claim in the instant case and the dangers inherent in positing jurisdiction (534 F.2d 1350).

Without question during the judicial history of our nation, hundreds of thousands of servicemen have become embroiled in disputes over fees charged by their lawyers. Nevertheless, petitioner cannot point to one case under which a federal court has ordered a military department to pay directly any due portion of pay and allowances owing a serviceman to his attorney, under the equitable lien theory or any other. Unlike other congressional appropriations, Department of Defense appropriations for military pay and allowances are strictly regulated by a scheme of federal statutes and implementing regulations. With a few narrow exceptions totally inapplicable to the instant case, the only deductions allowable from a serviceman's pay are listed in 37 U.S.C. §1007. Payments to an attorney owed fees, or any equitable lien holder, are not included among deductions allowable. The applicability of the equitable lien theory to attorneys of servicemen would wreak havoc on the tightly knit statutory scheme of military finance and accounting. Accordingly, this petition must not be granted.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should not be granted.

Dated, November 3, 1976.

Respectfully submitted,

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